

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID SCOTT ALBERS,

Petitioner,

CASE NO. 1:13-CV-1222

v.

HON. ROBERT J. JONKER

JEFFREY LARSON,

Respondent.

**ORDER APPROVING AND ADOPTING
REPORT AND RECOMMENDATION**

The Court has reviewed Magistrate Judge Brenneman's Report and Recommendation in this matter (docket # 8) and Petitioner's Objections to the Magistrate Judge's Report and Recommendation (docket # 11). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation itself; and Plaintiff's objections. The Court finds the Magistrate Judge's Report and Recommendation (docket # 8) is factually sound and legally correct.

Petitioner's lawsuit attacks his conviction and sentence on the theory that the Court lacked jurisdiction over his criminal case. The proper method for attacking a sentence for lack of jurisdiction is to file a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. Petitioner has not filed such a motion. For precisely the reasons the Magistrate Judge details, this lawsuit must be dismissed. Nothing in Petitioner's Objections changes the analysis. Moreover, Petitioner's petition would fail on the merits in any event. It is beyond dispute that the Court has jurisdiction over Petitioner's criminal case. To the extent Petitioner argues otherwise, he is simply mistaken.

Before Petitioner may appeal the Court's dismissal of his petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b)(1). The Federal Rules of Appellate Procedure extend to district judges the authority to issue certificates of appealability. FED. R. APP. P. 22(b); *see also Castro v. United States*, 310 F.3d 900, 901–02 (6th Cir. 2002). Thus the Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); FED. R. APP. P. 22(b)(1); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

A certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make the required “substantial showing,” the petitioner must demonstrate that “reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.” *Miller-El v. Cockrell*, 537 U.S. 322,

338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court does not believe that reasonable jurists would find the Court's assessment of the claim Petitioner raised debatable or wrong.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (docket # 8) is approved and adopted as the opinion of the Court.

IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus (docket # 1) is **DISMISSED**.

IT IS FURTHER ORDERED that Petitioner's Motions for Hearing (docket ## 6, 13) are **DENIED**.

IT IS FURTHER ORDERED that Petitioner's request for a certificate of appealability is **DENIED**.

Dated: August 14, 2014

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE